No. _____ (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TUAN AHN NGUYEN AND JOSEPH BOULAIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

Whether the distinction in 8 U.S.C. § 1409 between out-of-wedlock children of United States citizen mothers and out-of-wedlock children of United States citizen fathers is a violation of the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceeding below were the Petitioners Tuan Anh Nguyen and Joseph Boulais, and the Respondent Immigration and Naturalization Service.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 5

A. Factual Background..... 5

B. Proceedings Below.....6

REASONS FOR GRANTING THE PETITION..... 10

I. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE CONSTITUTIONALITY OF § 1409 10

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING THE CONSTITUTIONALITY OF § 1409.....11

III. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF THE CONSTITUTIONALITY OF § 1409.....14

CONCLUSION..... 17

APPENDIX A (court of appeals' opinion, April 17, 2000) 1a

APPENDIX B (the Board of Immigration Appeals' denial of the motion for reconsideration).....14a

APPENDIX C (the Board of Immigration Appeals' order)..... 17a

APPENDIX D (deportation order).....20a

TABLE OF AUTHORITIES

CASES

Page

Breyer v. Meissner, No. 98-1842, 2000 U.S. App. LEXIS 12453 (3d Cir., June 6, 2000)..... 11, 15

Califano v. Goldfarb, 430 U.S. 199 (1977)..... 15

Fiallo v. Bell, 430 U.S. 787 (1977) 9

Lake v. Reno, No. 99-4125 (2d Cir. argued Mar. 31, 2000)..... 14

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12

Miller v. Albright, 523 U.S. 420 (1998) ..... *passim*

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 15

Nguyen v. INS, 208 F.3d 528 (5th Cir. 2000)... *passim*

Rainey v. Chever, 527 U.S. 1044 (1999)..... 15

Terrell v. INS, 157 F.3d 806 (10th Cir. 1998)..... 14

United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999) 4, 10, 11, 14, 16

United States v. Virginia, 518 U.S. 515 (1996) 9, 15, 16

Weinberger v. Weisenfeld, 420 U.S. 636 (1975) 15

STATUTES

28 U.S.C. § 1254(1) 2

8 U.S.C. § 1105a(5) 7

8 U.S.C. § 1409 ..... *passim*

Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009, § 309(c)(I)(4) 7

MISCELLANEOUS

Amicus Brief of the ACLU, et al., *Miller v. Albright*, LEXIS 1996 U.S. Briefs 1060 (1997)(No. 96-1060) 15, 16

Petition for certiorari, *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir.), *petition for cert. filed*, (U.S. May 22, 2000) (No. 99-1872) 4, 5, 10, 11, 12, 13

Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 Sup. Ct. Rev. 1.....15, 16

Richard G. Wood, *When a Majority Loses on the Merits:* Miller v. Albright *and the Problem of Splintered Judgments*, 29 Seton Hall L. Rev. 816 (1998)..... 15

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tuan Anh Nguyen and Joseph Boulais respectfully petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on April 17, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 208 F.3d 528 (5th Cir. 2000) and is reproduced in the Appendix filed herewith. App. at 1a-13a. The opinion of the Board of Immigration Appeals on reconsideration is unreported and is reproduced at App. at 14a-16a. The initial

opinion of the Board of Immigration Appeals is unreported and is reproduced at App. at 17a-21a. The deportation order of the Immigration Judge is unreported and is reproduced at App. at 20a-21a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), as amended, 8 U.S.C. 1409, provides in pertinent part:

> Children born out of wedlock.
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 (8 U.S.C. 1401), and of paragraph (2) of section 308 (8 U.S.C. 1408), shall apply as of the date of birth to a person born out of wedlock if --
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,

> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years[1] --
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.
>
> * * * * *
>
> (c) Notwithstanding the provision of subsection (a) of this section, a person born . . . . outside of the United States and out of wedlock shall be held to have acquired at birth the

[1] Before 1986, this section required paternity to be "established by legitimation" before the child's twenty-first birthday. Nguyen belongs to a class of children who may elect whether to have the "old" or "new" § 1409 govern their cases. *See* note following 8 U.S.C. § 1409 (effective date of 1986 Amendment) (quoting § 23(e), Pub. L. 100-525, § 8(r), 102 Stat. 2619). Because no formal legitimation or recognition took place until after his twenty-first birthday, Nguyen is unable to comply with either requirement. As such, it is irrelevant which version of the law he elects to follow.

nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

INTRODUCTION

The issue in this case is whether a federal statute, 8 U.S.C. § 1409, violates the equal protection guarantee of the Fifth Amendment by imposing different standards on citizen fathers than on citizen mothers for conferring citizenship on their foreign-born out-of-wedlock children. In *Miller v. Albright*, 523 U.S. 420 (1998), the Court granted *certiorari* to resolve that question but failed to do so because the citizen father was not a party to the proceedings before this Court. The Ninth and Fifth Circuits are now divided on the constitutionality of § 1409. *See United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), *petition for cert. filed* (U.S. May 22, 2000) (No. 99-1872); *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000). The Solicitor General has asked this Court to review the judgment of the Ninth Circuit declaring the statute unconstitutional, and petitioners in the instant case seek review of the Fifth Circuit's ruling upholding the statute. For the reasons stated below, *certiorari* is warranted to resolve this important and recurring dispute over the constitutionality of a federal statute governing citizenship.

The instant case is the appropriate vehicle for resolving the constitutionality of § 1409. Unlike *Miller*, both the citizen father and his child are parties to this proceeding. Therefore, the standing question that prevented a definitive merits ruling in *Miller* is not present here. In contrast, because only the child is before the Court in *Ahumada-Aguilar*, that case may raise the same question of standing

that divided the *Miller* Court. Indeed, the Government's principal argument in its *Ahumada-Aguilar certiorari* petition is that the Court should not reach the constitutionality of § 1409 in that case because the child lacks standing to assert his father's equal protection claim. Accordingly, if the Court determines that the equal protection question warrants plenary review, the instant case is the appropriate vehicle because it insures that the constitutional question will be squarely presented.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Tuan Anh Nguyen and his father Joseph Boulais seek review of an order of the Fifth Circuit Court of Appeals which held that 8 U.S.C. § 1409, which imposes more restrictive requirements for conferring citizenship by citizen fathers than by citizen mothers, does not contravene the equal protection component of the Fifth Amendment.

Tuan Anh Nguyen was born in Saigon, Vietnam on September 11, 1969, the natural son of Joseph Alfred Boulais, an American citizen. Boulais never married Nguyen's mother, a Vietnamese national who abandoned Nguyen soon after his birth. Boulais stayed in Vietnam after his honorable discharge from the military and eventually married another Vietnamese woman who helped him raise Nguyen. When the government of Vietnam fell to communist forces in April 1975, Boulais and his wife were on a trip out of the country. Boulais and his wife returned immediately to the United States. Nguyen's step-grandmother fled with Nguyen on an American ship carrying refugees out of Saigon, and Nguyen was paroled into the United States as a refugee. Nguyen became a

lawful permanent resident of this country and was cared for and raised throughout his childhood by Boulais and his wife. R. at 33.[2]

Nguyen's natural mother never made any attempt to obtain custody and never communicated with Nguyen or Boulais after she abandoned the infant Nguyen. Boulais raised his son, supported him financially, and provided him with a home. Boulais never formally legitimated Nguyen. *Id.*

B. Proceedings Below

In 1992, Nguyen was convicted of sexual assault and has served his sentence for that offense. R. at 151-56. In 1995, he was placed in deportation proceedings by the Immigration and Naturalization Service. *Id.* at 183-87. On January 30, 1997, he was ordered deported by an immigration judge. App. at 20a. His appeal to the Board of Immigration Appeals ("BIA") was dismissed on June 2, 1998. *Id.* at 17a ("BIA ruling"). Nguyen is now detained by the Immigration and Naturalization Service, subject to deportation to Vietnam.

Prior to the BIA ruling, on February 3, 1998, Boulais obtained an Order of Parentage from a Texas District Court, declaring him to be the father of Nguyen and holding that a parent-child relationship exists between the father and the child for all purposes. R. at 26-29. DNA testing confirmed to a 99.98% degree of certainty that Boulais is Nguyen's biological father. *Id.* at 23-24. That evidence was presented to the BIA but apparently was not taken into account when

[2] Certified Administrative Record submitted to the court of appeals by the Immigration and Naturalization Services on August 5, 1998 [hereinafter R.].

the BIA dismissed Nguyen's appeal. Nguyen moved for reconsideration, in part, to ask the BIA to consider that evidence. The BIA denied the motion for reconsideration. App. at 16a.

On June 30, 1998, Nguyen and Boulais timely filed a petition for review of the BIA ruling with the Fifth Circuit Court of Appeals. Nguyen and Boulais filed their petition for review of the BIA ruling pursuant to 8 U.S.C. § 1105a(5) (1994), which confers jurisdiction on the courts of appeals to hear appeals of deportation orders based on nonfrivolous claims to United States citizenship.[3] They argued that § 1409 violates the Fifth Amendment of the United States Constitution, which guarantees equal protection of the law, because the statute imposes different requirements on citizen fathers and citizen mothers for conferring citizenship on their foreign-born out-of-wedlock children.

On July 2, 1998, Nguyen and Boulais also jointly filed an action in the District Court for the Southern District of Texas seeking review of the BIA ruling and requesting declaratory relief that Nguyen has been a United States citizen since birth.[4]

On April 17, 2000, the Fifth Circuit first held that the governing jurisdictional statute conferred jurisdiction to

[3] *See* 8 U.S.C. § 1105a(a)(5)(19994). The petition for review is governed by former 8 U.S.C. § 1105a, as amended by the "transitional" judicial review rules enacted by IIRIRA, which apply to deportation proceedings initiated before April 1, 1997. *See* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009, § 309(c)(I)(4).

[4] The District Court has held that action in abeyance pending the outcome in the Court of Appeals and action on this petition.

determine the citizenship claim. App. at 6a. On the citizenship claim, the court found that, because a Texas court had entered an "Order of Parentage" establishing Boulais to be Nguyen's biological father, no genuine issue of material fact existed and there was therefore no need to remand the case to the District Court for any factual determination. *Id.*

Turning to the equal protection argument, the Court of Appeals reviewed this Court's fractured decision in *Miller v. Albright*, 523 U.S. 420 (1998), which generated five separate opinions. In *Miller*, a six-Justice majority affirmed the denial of the petitioner's claim to citizenship. Two of those Justices concurred in the result only because, in their view, the petitioner lacked third-party standing to raise the equal protection rights of her father (who was not a party to the case before this Court). Thus, heightened scrutiny did not apply. 523 U.S. at 451 (O'Connor, J., concurring in the judgment). Solely on that limited basis, Justices O'Connor and Kennedy joined the result reached by Justice Stevens and Chief Justice Rehnquist, who concluded that the statute survived heightened scrutiny, *id.* at 423, and Justices Scalia and Thomas, who concluded in their concurrence that the Court lacked authority to recognize the petitioner as a citizen, *id.* at 453.

Significantly, the opinion of Justice O'Connor (joined by Justice Kennedy) also stated that "I do not share Justice Stevens' assessment that the provision withstands heightened scrutiny . . . . It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny[.]" *Id.* at 451-52 (O'Connor, J., concurring in the judgment). The three dissenting Justices -- Justices Breyer, Souter, and Ginsburg -- likewise concluded that § 1409 does not survive heightened scrutiny because the discriminatory burdens placed on fathers "lack the 'exceedingly persuasive' support that the Constitution requires." *Id.* at 472 (Breyer, J.,

dissenting) (*quoting United States v. Virginia*, 518 U.S. 515, 530 (1996)). Therefore, as Justice Breyer (with the concurrences of Justices Souter and Ginsburg) recognized, "a Court majority does not share" the "assessment that the provision withstands heightened scrutiny." *Id.* at 476 (quotation omitted); *see also id.* at 460 (Ginsburg, J., dissenting) (recognizing that a "solid majority [of the Court] adheres to [the] vital understanding" that sex-based classifications based on stereotypes are unconstitutional).

Faced with these fractured opinions, the Fifth Circuit in this case first held that heightened scrutiny was the appropriate standard of review, rejecting the Government's argument that the lesser standard set forth in *Fiallo v. Bell*, 430 U.S. 787 (1977), should apply. App. at 11a. The Fifth Circuit found that Boulais was a proper party to challenge the constitutionality of § 1409 and that Boulais, unlike the father in *Miller*, "ha[d] made every effort to represent his own interests in the present suit." *Id.* at 9a-10a.

The court then applied *Miller* in addressing the constitutionality of § 1409. Here, however, the court followed only the reasoning in the opinion of Justice Stevens. Addressing the argument that § 1409 is unconstitutional because it relies on outmoded stereotypes about fathers and mothers, the court noted that Justice Stevens' opinion identified several important governmental objectives, including the need to ensure reliable proof of paternity, encourage healthy parent-child relationships and foster ties between a foreign-born child and the United States. App. at 8a, 12a (*citing Miller*, 523 U.S. 437-38 (Stevens, J.)). The court also agreed with Justice Stevens that the statute is narrowly tailored to meet these objectives.

Having found § 1409 to be constitutional under Justice Stevens' opinion in *Miller*, notwithstanding the stated

views of a majority of the Court, the Fifth Circuit concluded that Petitioners failed to meet the requirements of that provision, thus rendering Nguyen an alien. Because it found Nguyen to be an alien who has been convicted of an aggravated felony, the court concluded that it lacked jurisdiction and granted the Government's motion to dismiss the petition for review. App. at 13a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE CONSTITUTIONALITY OF § 1409.

Review by this Court is necessary to resolve a conflict among the circuits on the constitutionality of 8 U.S.C. § 1409, a federal statute governing the conferral of United States citizenship. The court of appeals upheld the relevant provisions of 8 U.S.C. § 1409, based on Justice Stevens' opinion in *Miller* (even though that opinion was joined only by the Chief Justice). *See, e.g.*, App. at 11a-13a. In *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999), the Ninth Circuit reached the opposite result and struck down the relevant portions of § 1409.[5] After analyzing the various decisions in *Miller*, the Ninth Circuit held §1409 to be unconstitutional in light of its understanding that "a majority of the U.S. Supreme Court has effectively so declared," 189 F.3d at 1122, as well as its own independent judgment that the "outdated stereotype"

[5] The Government has filed a petition for *certiorari* in *Ahumada-Aguilar*, citing this split between the Fifth and Ninth Circuits as an important factor weighing in favor of this Court's consideration of the constitutionality of § 1409. *See* Petition for Certiorari at 20-22, *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir.), *petition for cert. filed*, (U.S. May 22, 2000) (No. 99-1872) [hereinafter *Ahumada-Aguilar* Petition].

embodied in the statute, "relies on the generalization that mothers are more likely to have close ties to and care for their children than are fathers," and cannot withstand heightened scrutiny. *Id.* at 1126-27.

The conflict could not be more clear. The Fifth and Ninth Circuits have adopted diametrically opposed views on the constitutionality of § 1409. As a result, the nation's laws governing conferral of citizenship at birth lack uniformity and depend upon the place of a person's residence. If Nguyen had resided in a state within the Ninth Circuit's jurisdiction, he would have been accorded citizenship under the decision in *Ahumada-Aguilar*. The existence of different citizenship criteria in the Fifth and Ninth Circuits creates confusion in administration of the law in those circuits as well as other jurisdictions. Clearly, citizenship laws should be uniform across the nation. This intolerable situation necessitates this Court's intervention.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING THE CONSTITUTIONALITY OF § 1409.

In *Miller*, the Court granted *certiorari* to resolve the constitutionality of § 1409. 523 U.S. 420, 428 (1998). However, the Court failed to render a definitive decision because the father was not a party to the proceeding in this Court and because two Justices found that the petitioner in *Miller* lacked standing to raise the equal protection claim of the citizen father. As a result, *Miller* has not provided clear guidance for the lower courts. *Compare* App. at 9a *with Ahumada-Aguilar*, 189 F.3d at 1125-26. *See also Breyer v. Meissner*, No. 98-1842, 2000 U.S. App. LEXIS 12453 at *20-21 (3d Cir., June 6, 2000) (striking down gender-based classifications in an analogous immigration law provision, while noting that "the precedential value of *Miller* is

unclear"). As explained below, the Court should grant *certiorari* in the present case because here -- unlike *Miller* and *Ahumada-Aguilar* – both the father and the child are parties to this action.

Clearly, the confusion engendered by *Miller* has arisen because the question of standing prevented this Court from reaching a majority holding on the merits. Yet the Government's petition for *certiorari* currently pending in *Ahumada-Aguilar* vigorously asserts that the merits are also beyond the Court's reach in that case. According to the Government, because the citizen father in that case is deceased and had no prior contact with the child who now asserts the father's constitutional rights, no party to the suit has standing to raise the question of § 1409's constitutionality. *Ahumada-Aguilar* Petition, at 10-15. The Government's analysis demonstrates that *Ahumada-Aguilar* is not the proper vehicle for resolving the constitutionality of § 1409 since, the Government asserts, standing issues would once again frustrate this Court from issuing a definitive ruling on the merits. Indeed, in its petition in *Ahumada-Aguilar*, the Government does not even ask the Court, in the first instance, to hear the case on the merits; instead, it seeks a summary reversal on the threshold question of standing. *Id.* at 16.

In this case, by contrast, both the citizen father and the child are before the Court, vigorously defending their rights. Here, the Court need not speculate concerning the desires of a deceased father or a father who is not a party to the action. Further, there can be no question that a citizen father has standing to raise his own equal protection rights in a challenge to § 1409. *See Miller*, 523 U.S. at 447-48 (O'Connor, J., concurring in judgment) (characterizing the Government's argument that the citizen father lacked standing as "misguided"); *accord Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560-61 (1992) (holding that standing is proper where a party has suffered an "injury in fact"). In short, the question of standing poses no impediment to consideration of the constitutional question presented.[6]

Even in the unlikely event the Court were to conclude that Boulais is not a proper party to this case, Nguyen would have third-party standing to raise his father's rights under the standards applied by all members of the Court in *Miller*, including Justice O'Connor's concurrence. If Boulais is prevented from protecting his interests in this case, the requisite "hindrance" that two Justices found lacking in *Miller* would exist to confer third-party standing on his son. Unlike the father in *Miller*, who failed to appeal his early dismissal from that case, Boulais continues to vigorously assert his own rights. According third-party standing would ensure that Boulais' constitutional rights are considered in the context of *this* proceeding, the outcome of which will have a significant, if not preclusive, impact on Boulais' interests. Moreover, this case easily meets the additional requirement for third-party standing that there be a "close relationship" between Nguyen and his father, given that Boulais raised his son from infancy following the mother's abandonment. In *Ahumada-Aguilar*, the Government challenges the deceased father's standing on the ground that respondent's "only relationship with his father was genetic," and there is no indication that the father would have wished to pursue his own rights. *Ahumada-Aguilar* Petition, at 14. Whatever the validity of that contention, no such obstacle to considering the merits exists in this case.

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[6] The Government objected below to Boulais' participation in this action, but the court of appeals correctly rejected the Government's contention out of hand. App. at 10a, n.6 (noting that the challenged statute "directly implicates a father's rights to confer citizenship on his children").

This Court is now faced with petitions for *certiorari* in two cases presenting conflicting views of the underlying constitutional question in *Miller*. Given the Court's scarce resources, the confusion arising from the absence of a majority holding in *Miller*, and the absence of any obstacles to consideration of the merits here, this case is plainly the appropriate vehicle for resolving that question. Accordingly, the Court should grant *certiorari* in this case, and hold the petition in *Ahumada-Aguilar* for subsequent disposition following a decision on the merits in this case.

III. THE COURT SHOULD GRANT *CERTIORARI* TO ADDRESS THE IMPORTANT QUESTION OF THE CONSTITUTIONALITY OF § 1409.

The question presented in this case -- the constitutionality of § 1409 -- is no less important now than it was when the Court granted *certiorari* to consider it in *Miller*. To the contrary, developments subsequent to *Miller* only underscore the need for the Court to more clearly address this issue.

First, the issue of § 1409's constitutionality is a recurring one. In the short time since *Miller*, at least four cases raising this issue have already made their way to the courts of appeal: *Nguyen*; *Ahumada-Aguilar*; *Terrell v. INS*, 157 F.3d 806 (10th Cir. 1998); and *Lake v. Reno*, No. 99-4125 (2d Cir. argued Mar. 31, 2000).

Second, additional guidance on this issue is clearly warranted. Of the two courts of appeals cases reaching the merits of § 1409's constitutionality since *Miller*, *Ahumada-Aguilar* struck down the relevant portions of the statute, while the *Nguyen* court upheld those provisions. Moreover, in applying strict scrutiny to strike down an analogous

gender-based immigration law applicable to foreign-born children of United States citizens born prior to 1934, the Third Circuit Court of Appeals specifically noted the lack of clear guidance from this Court. *Breyer v. Meissner*, No. 98-1842, 2000 U.S. App. LEXIS 12453, at * 21 (3d Cir., June 6, 2000). Indeed, several members of this Court have acknowledged that, "the fractured decision in *Miller* may demonstrate the need for additional guidance as to the constitutionality of laws differentiating between fathers and mothers of out-of-wedlock children." *See e.g., Rainey v. Chever*, 527 U.S. 1044, 1047 (1999), *denying cert. to* 510 S.E.2d 823 (Ga. 1999) (Thomas, J. dissenting). *See also* Richard G. Wood, *When a Majority Loses on the Merits:* Miller v. Albright *and the Problem of Splintered Judgments*, 29 Seton Hall L. Rev. 816 (1998).

Finally, the question of § 1409's constitutionality presents a substantial question concerning laws based on gender stereotypes. In this regard, the Fifth Circuit's failure to follow the views of a majority of the Justices in *Miller* is particularly troubling. This Court has repeatedly made clear that sex-based stereotyping is an impermissible form of gender discrimination. *See United States v. Virginia*, 518 U.S. 515, 541-46 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (plurality opinion); *Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975). As noted by Justice O'Connor in *Miller*, "it is unlikely" that "gender classifications based on stereotypes can survive heightened scrutiny." 523 U.S. at 452.[7]

[7] A majority of this Court cited heightened scrutiny as the appropriate standard of review in *Miller*. 523 U.S. 440 (Stevens, J.); *id.* at 478 (Breyer, J., dissenting). This issue is more fully addressed in Amicus Brief of the ACLU, et al., *Miller v. Albright*, LEXIS 1996 U.S. Briefs 1060 (1997)(No. 96-1060). *See also* Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and*

The stereotypes on which § 1409 is based are patently clear. As the Ninth Circuit found in *Ahumada-Aguilar*, "[b]y requiring a U.S. citizen father to agree in writing that he will provide financial support to the child until the child reaches the age of 18, [§1409] (a)(3) presumes that a father will not care for and support his child unless required to do so." 189 F.3d at 1126-27.

Similarly, as Justice Breyer noted in *Miller*, § 1409(a)(4) assumes that a paternity establishment requirement is needed to "mak[e] certain the father knows of the child's existence." 523 U.S. at 485 (Breyer, J., dissenting). However, as Justice Breyer points out (and as is illustrated in this case), "[a] father with strong ties to the child may, simply by lack of knowledge, fail to comply with the statute's formal requirements," while "[a] father with weak ties might readily comply." *Id.* at 485-86.

In *United States v. Virginia*, this Court reaffirmed in the strongest possible terms that gender-based classifications will pass muster under heightened scrutiny only if the government affirmatively advances an "exceedingly persuasive justification." 518 U.S. at 531, 555. The justifications offered by the Government, as set out in *Miller* and recited in the lower court opinion, are insufficient to support this suspect classification. While the Government argues that the requirements of § 1409(a) are essential to administration of citizenship laws, the facts of this case, in which Nguyen has a close bond with his father and no more than a genetic tie to his natural mother, underscore that the criteria are simply based on sex stereotypes relating to men's and women's parenting roles. *See* Amicus Brief of the

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Executive Branch Decision Making in Miller v. Albright, 1998 Sup. Ct. Rev. 1, 18-32.

ACLU at 6-12, *Miller* (No. 96-1060). Review by this Court is necessary to clarify that sex-based stereotypes have no place in our nation's laws, and that such discriminatory stereotypes may not be used to deny the rights of citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60418

TUAN ANH NGUYEN; JOSEPH ALFRED BOULAIS,
Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

[Decided: April 17, 2000]

OPINION

Before; POLITZ and STEWART, Circuit Judges, and LITTLE, * District Judge.

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* District Judge of the Western District of Louisiana, sitting by designation.

CARL E. STEWART, Circuit Judge:

Tuan Anh Nguyen ("Nguyen") and Joseph Alfred Boulais ("Boulais") appeal the Board of Immigration Appeals ("BIA") order of deportation entered against Nguyen. For the following reasons we grant the Immigration and Naturalization Service's motion to dismiss the appeal for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Nguyen was born September 11, 1969 in Vietnam. His mother is a Vietnamese citizen. The co-petitioner, Boulais, is Nguyen's natural father.[1] Nguyen's mother abandoned him at birth. In June 1975, Nguyen was brought to the United States as a refugee becoming a lawful permanent resident pursuant to the Indochinese Refugee Act. Nguyen settled in Texas where he was raised by Boulais. Nguyen never had any subsequent contact with his natural mother.

On August 28, 1992, Nguyen plead guilty in Texas state court to two felony charges of sexual assault on a child. He was sentenced to eight years in prison for each crime. While confined in state prison in Huntsville, Texas, Nguyen was interviewed by an INS agent. He told the agent he was a native and citizen of Vietnam as well as the circumstances surrounding his entry in the United States. Based on this information, the INS began deportation proceedings against Nguyen on April 4, 1995. The INS argued that Nguyen was subject to deportation as an alien who had been convicted of two crimes involving moral turpitude and an aggravated felony under INA § 241(a)(2)(A)(ii)and (iii) (codified at *8* U.S.C. §§ 1251 (a)(2)(A)(ii)-(iii) (1994)).

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[1] It was established through DNA testing conducted in December 1997 that it is 99.98% certain that Boulais is Nguyen's biological father.

While in state prison in Huntsville, Texas Nguyen appeared at two hearings before an immigration judge. At the first hearing, in November 1996, Nguyen indicated that he wished to challenge the show cause order on the ground that he was a United States citizen. The judge continued the hearing to allow Nguyen time to present proof of his citizenship. At the second hearing in January 1997, his attorney withdrew, and the immigration judge went forward and advised Nguyen of his procedural rights and conducted the hearing. During the colloquy conducted by the immigration judge, Nguyen testified under oath that he was not a citizen of the United States and that he was a citizen of Vietnam. He also admitted that he was convicted of the aforementioned crimes. On the basis of this testimony the immigration judge found that Nguyen was deportable. Nguyen timely appealed the immigration judge's order to the BIA.

While his appeal was pending, Mr. Boulais instituted a paternity proceeding in a Texas district court. In February 1998, based on DNA testing results Boulais obtained an "Order of Parentage" adjudging that he is the father of Nguyen. Since the BIA's briefing schedule called for submission of Nguyen's brief prior to the completion of DNA testing and the issuance of the paternity decree, Nguyen submitted an initial brief to the BIA outlining his United States' citizenship argument, but did not include the DNA evidence to support his claim. On April 15, 1998 he filed a supplemental brief which included the relevant evidence. On June 2, 1998, the BIA dismissed Nguyen's appeal.

On June 26, 1998 Nguyen filed a Motion to Reconsider with the BIA which has not to date been adjudicated. On July 2, 1998 Mr. Boulais and Nguyen filed a habeas petition in the United States District Court, challenging the BIA's deportation order and denial of relief from deportation. The petitioners also filed a request for declaratory judgment as to

the citizenship issue. Because of the multi-layered requests in the district court action, the magistrate judge agreed to hold that matter in abeyance pending this court's decision.[2] The INS has filed a motion to dismiss this appeal for lack of jurisdiction, and this court ruled that the motion should be carried with the case.

DISCUSSION

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, § 309(c)(4)(G), 110 Stat. 3009, 626-27, contains the standards for criminal deportees whose deportation proceedings commence before IIRIRA's general effective date of April 1, 1997, and conclude more than thirty days after its passage on September 30, 1996. Section 309(c)(4)(G) provides that there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(I) of such Act (as so in effect).

It has been established that this language "completely forecloses our jurisdiction to review decisions of the BIA." *Lerma de Garcia v. INS*, 141 F.3d 215, 216 (5th Cir. 1999) (quoting *Nguyen v. INS*, 117 F.3d 206, 207 (5th Cir.1997)). The petitioners do not contest that Nguyen was convicted of a crime specified in INA § 241(a)(2)(A)(ii), namely crimes involving moral turpitude, and an aggravated felony.

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[2] The pending case is styled as *Nguyen vs. Reno*, Civ. No. H-98-2086 (S.D. Tex., complaint filed July 2, 1998).

If Nguyen is found to be an alien, this court will not have jurisdiction to review the BIA's decision. *See Terrell v. INS*, 157 F.3d 806, 809 (10th Cir. 1998) (concluding that petitioner who was being deported under IIRIRA § 309(c)(4)(g) was not a citizen and therefore the court lacked jurisdiction to review BIA deportation order). Thus, it is a threshold question in the determination of our jurisdiction for this court to determine whether Nguyen is a citizen. *See Okoro v. INS*, 125 F.3d 920, 925 n. 10 (5th Cir. 1997) ("when judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists. The doctrine that a court has jurisdiction to determine its jurisdiction rests on this understanding") (quoting *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997)).

INA § 106(a)(5) states:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim . . .

8 U.S.C. § 1105a (5) (1994).[3] The petitioners argue that because the immigration judge and the BIA did not consider

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[3] 8 U.S.C. § 1105a was repealed in 1996, and succeeded by 8 U.S.C. § 1252(b)(5) which also concludes that if there is no genuine issue of material fact presented as to the petitioner's nationality the court of appeals should decide the issue.

the proof regarding Nguyen's parentage this case should be transferred to the district court for de novo determination of these issue. However, the statute does not require that the BIA or immigration judge have heard this evidence, instead it only requires that no genuine issue of material fact exist. In February 1998, a Texas court entered an "Order of Parentage" which establishes that Boulais is Nguyen's biological father. Therefore, there are no genuine issues of material fact regarding Nguyen's nationality leaving this court to determine whether Nguyen is a citizen of the United States.

I. Citizenship

It has been recognized that there are only two sources of citizenship, birth and naturalization. *Miller v. Albright*, 523 U.S. 420, 423, 118 S. Ct. 1428, 1432, 140 L. Ed. 2d 575 (1998) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702, 18 S. Ct. 456, 477, 42 L. Ed. 890 (1898)). Those persons not born in the United States may only acquire citizenship by birth as provided by Acts of Congress. *Miller*, 523 U.S. at 423. Nguyen claims that although born in Vietnam he acquired citizenship at birth under INA § 301. The provision states that:

> The following shall be nationals and citizens of the United States at birth:...(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

8 U.S.C. § 1401. However, there is an exception to this general provision for children born out of wedlock. INA §

309 states that the aforementioned INA § 301 applies to children born out of wedlock if:

> (a)(1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality at the time of the person's birth
>
> (3) the father (unless deceased) has agreed in writing to provide financial support until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years-
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court . . .
>
> (c) Notwithstanding the provisions of subsection (a) of this section, a person born...outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of said persons birth, and if the mother had been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8 U.S.C. § 1409. This provision allows for out of wedlock children of citizen mothers to automatic citizenship at birth, while out of wedlock children of citizen fathers cannot establish their citizenship unless the citizen father takes

certain affirmative steps. It is clear that Nguyen has failed to establish the citizenship requirements outlined in INA § 309. Boulais failed to "legitimate" Nguyen before his eighteenth birthday by acknowledging paternity in writing or establishing Nguyen's paternity in a court of competent jurisdiction.

The petitioners argue that although he fails to meet the requirements of INA § 309, that this provision should not be applied because it violates the Fifth Amendment of the United States Constitution which guarantees equal protection under the law. Specifically, petitioners contend that the statute makes it more difficult for male citizens to confer citizenship on their offspring born out of wedlock than for citizen mothers to confer citizenship.

This equal protection argument was addressed by the Supreme Court in *Miller v. Albright, see* 523 U.S. at 423. A plurality opinion authored by Justice Stevens,[4] applying the heightened scrutiny standard which is used in gender bias claims, found that INA § 309 did not violate the equal protection clause. The court found that the statute met several important governmental objectives, including ensuring reliable proof of a biological relationship between the citizen parent and the child, encouraging a healthy relationship between the citizen parent and the child while the child is a minor, and fostering ties between the foreign born child and the United States.

Justice O'Connor concurring in the judgment disagreed with the court's application of the heightened scrutiny standard.[5] *See Id.* at 445-46. Justice O'Connor explained that Miller's father had earlier been wrongly dismissed from the action by the district court and therefore there was no first-

[4] Only Chief Justice Rehnquist concurred in the opinion.

[5] Justice Kennedy joined in Justice O'Connor's Concurrence.

party claim of gender discrimination. *Id.* at 447-48. Therefore, the only way for the court to address the gender discrimination claim would be to allow Miller to represent her father's interest by giving her third party standing. However, Justice O'Connor concludes that Miller could not meet the requirements for third party standing, because there was no substantial hindrance to her father's ability to assert his own rights. *Id.* at 447-48. Therefore, because the alleged equal protection violation implicated the citizen father's rights and not the rights of the child, Miller, as the child, was only entitled to rational basis review of the statute. *Id.* at 451.

The fractured opinions of the Supreme Court in *Miller* demonstrate that we must first address standing in deciding what level of scrutiny to apply to the gender discrimination claim made in this case. The question of standing has been pivotal in recent cases from our sister circuits regarding the constitutionality of INA § 309. *See Terrell*, 157 F.3d at 808 (concluding that petitioner's father was not a party to the suit and petitioner was not entitled to third party standing and therefore the statute should only be reviewed for rational basis); *United States v. Ahumada-Aguilar,* 189 F.3d 1121, 1126 (9th Cir. 1999) (finding third party standing because petitioner's father was deceased, and ultimately finding the statute could not withstand heightened scrutiny).

In the present case we have facts that are in some significant ways distinct from those in *Miller*. Boulais is a petitioner in the present action unlike the fathers in *Miller* and *Terrell*. Boulais was not a party to the proceedings below because the deportation action was brought only against Nguyen. Boulais is also a petitioner in the habeas action which is pending in the district court. Therefore, it is clear that Boulais has made every effort to represent his own interests in the present suit. We find that Boulais should be allowed to represent his own interest in the present action. In *Miller*, Justice O'Connor stated that: "[the father] originally

filed suit and asserted his own rights but then opted not to pursue his claim throughout this litigation. It is true that he was *wrongly* dismissed from the action . . . and that the Government made the misguided argument before that court that 'the rights, if any, which have been injured are those of [the daughter], the true plaintiff in this action'." *See Miller,* 523 U.S. at 448. In the present case, the government also argues that Boulais' rights have not been injured because he is not the party who is to be deported.[6] Based on Justice O'Connor's clear statement in *Miller* regarding this argument, we find the government's position unpersuasive.[7] Boulais is a proper party in this action to challenge the constitutionality of INA § 309.

Having resolved the standing question we will now address the constitutionality of the statute in question. The petitioners argue that INA § 309 is unconstitutional because

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[6] The government cites this court's opinion in *Garcia v. Boldin,* 691 F.2d 1172, 1183 (5th Cir. 1982) for the proposition that families of deportable aliens do not have standing to challenge a deportation order. Unlike this case, in Garcia the family of the deporatable alien was not attempting to challenge a statute which was directed at the rights of the family itself. In the present case INA § 309 directly implicates a father's rights to confer citizenship on his children.

[7] It is also important to note that all of the other seven justices who did not join in Justice O'Connor's concurrence found that even if *Miller*'s father was not a party to the suit *Miller* would have third-party standing to assert her father's challenge to the statute. In the plurality opinion, citing *Craig v. Boren,* 429 U.S. 190, 193-97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), Justice Stevens concluded that *Miller*'s claim relied heavily on her citizen father's right to transmit citizenship and thus the court would evaluate the alleged discrimination against him. *See Miller,* 523 U.S. at 432. While Justice Scalia joined by Justice Thomas did not agree with the plurality opinion's reasoning regarding third party standing they also "accept the petitioner's third party standing." *Id.* at 455 n.1. The dissenters also conclude that *Miller* met the requirements for third party standing. *Id.* at 473.

it relies on outdated stereotypes regarding male and female parents. First, the INS contends that as an immigration statute INA § 309 should be reviewed under the "facially legitimate and bona fide reason standard" set forth by the Supreme Court in *Fiallo v. Bell,* 430 U.S. 787, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). In *Fiallo,* the Supreme Court held that an immigration statute that distinguished between "legitimate" and "illegitimate" children of United States citizens in giving preference for immigration status to aliens, met equal protection standards because the distinctions in the statute were based on a "facially legitimate and bona fide reason." *Id.* at 794 (citation omitted). The INS correctly points out that this court has followed *Fiallo* in a number of immigration cases. *See e.g., Rodriguez v. INS,* 9 F.3d 408, 410, 414 (5th Cir. 1993) (applying *Fiallo* limited review standard to alien's claim seeking waiver of deportation under INA § 212(c)); *Matter of Longstaff,* 716 F.2d 1439, 1442-43 (5th Cir. 1983) (applying *Fiallo* limited review standard in deciding alien's claim for naturalization). However, we do not find that *Fiallo* dictates the outcome of the present case. As the plurality opinion in *Miller* points out there are significant differences between INA § 309 which is challenged in the present case, and the INA statute challenged in *Fiallo.* Specifically, the statute in *Fiallo* dealt with the claims of aliens for special immigration preferences for aliens, whereas the petitioner's claim in this case is that he is a citizen. *See Miller,* 523 U.S. at 429 (Stevens, J.). Furthermore, the constitutional challenge in *Fiallo* dealt with statutory distinctions between "illegitimate" and "legitimate" children, an issue which is not presented in this case. *Id.* Therefore, we decline to adopt the *Fiallo* "facially legitimate and bona fide reason" standard in the present case.

The petitioners contend that recent Supreme Court cases have established that statutes which rely on outmoded generalizations about gender cannot survive heightened scrutiny. *See, e.g., United States v. Virginia,* 518 U.S. 515,

540-546, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Faced with the serious and complex question of the constitutionality of the statute we take guidance from the most recent reasoning of the Supreme Court on this issue. The plurality opinion in *Miller* offers several important governmental objectives that are met by the INA § 309.[8] First, the plurality opinion found that the statute helps to ensure reliable proof of a biological relationship between the citizen parent and the child. *Miller*, 523 U.S. at 436 (Stevens, J.). For a mother the blood relationship between parent and child is evident. *Id.* The opinion reasons that in the case of fathers it is necessary that affirmative steps are taken to demonstrate the biological relationship. *Id.* The statute allows the father to prove this relationship through fairly uncomplicated methods such as signing a statement of paternity under oath, having paternity adjudicated by a competent court or legitimating the child under the law of the parent's state. These steps must be taken before the child reaches eighteen. The plurality opinion in *Miller* concluded that requiring the steps to be taken before eighteen insures that the information relied upon to establish paternity is reliable. *Id.* at 437-38 (Stevens, J.).

The plurality opinion in *Miller* further found that the statute is also well tailored to meet the important governmental objectives of encouraging healthy parent-child relationships while the child is a minor, and fostering ties between the foreign born child in the United States. Justice Stevens concluded that these objectives need to be encouraged in citizen fathers especially, because in the case

[8] In *Miller*, the plurality opinion only addresses the constitutionality of 8 U.S.C. § 1409(a)(4). *See Miller*, 523 U.S. at 432. The dissent addresses the constitutionality of 8 U.S.C. § 1409(a)(3) and (a)(4). *Id.* at 473 (Breyer, J., dissenting). The present case asks us to address the constitutionality of all of 8 U.S.C. § 1409. Specifically, Boulais did not meet the requirements set forth in 8 U.S.C. § 1409(a)(3) and (a)(4).

of citizen mothers they will already know the child exists and be able to develop bonds with the child from an early age because they will obviously be with the child at its birth. *Id.* at 438. (Stevens, J.). Whereas the unmarried citizen father will not necessarily be present at the birth of the child or even know of the child's existence, making it impossible for the citizen father to develop a healthy relationship with the child. *Id.* By requiring fathers to take affirmative steps to establish paternity the government assures that the father and child will meet and have an opportunity to develop a relationship. *Id.* For the foregoing reasons set forth by the Supreme Court's plurality opinion in *Miller*, we find that INA § 309 is constitutional.

CONCLUSION

Having found INA § 309 to be constitutional, we also find that Nguyen does not meet the criteria for citizenship outlined in 8 U.S.C. § 1401, Boulais did not establish Nguyen's paternity before he reached the age of majority. Although Boulais has now obtained an order of parentage that order was decreed in 1998, and Nguyen was twenty eight years old. Thus, due to Nguyen's status as an alien, under IIRIRA this court is precluded from reviewing the BIA's final deportation order. Thus, we grant the INS's motion to dismiss the appeal.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A22 083 216-Huntsville Date: May 28, 1999

In re: TUAN ANH NGUYEN

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Nancy A. Falgout, Esquire
P.O. Box 7873
Houston, Texas 77270

In a decision dated January 30, 1997, an Immigration Judge found the respondent deportable as charged under sections 241(a)(2)(A)(ii) and (iii) of the Immigration and Nationality Act, 8 U.S.C §§ 1251(a)(2)(A)(ii) and (iii). The Immigration Judge also determined that the respondent was statutorily ineligible for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c). The respondent's appeal was dismissed by this Board on June 2, 1998. On June 26, 1998, the respondent filed a motion to reconsider. The motion will be denied.

A motion to reconsider must state the reasons for reconsideration, be supported by pertinent case precedent,

and be predicated on a legal or factual defect in the most recent decision. See 8 C.F.R. § 3.2(b) (1997); Matter of Cerna, 20 I&N Dec. 399 (BIA 1991). A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. Matter of Cerna, supra.

The respondent seeks by this motion to challenge the finding of deportability, claiming derivative United States citizenship. The respondent maintains his supplemental brief together with evidence submitted with that supplemental brief were not considered by the Board when the June 2, 1998, decision was made. It appears that the supplemental brief and additional evidence were not associated with the record at the time of our decision. The information submitted pertains to the evidence going to the question of the respondent's parentage. The respondent argues in his motion that the statutory framework of rules establishing entitlement to derivative citizenship is unconstitutional, as the standards required for illegitimate children to obtain derivative citizenship from a father differ from the standards required to obtain that status derivatively from the mother. It is further contended that the respondent's citizenship claim could be affected by a case pending before the United States Supreme Court.

The respondent admitted at the deportation hearing that he is a native of Vietnam (Tr. at 9). Having admitted his foreign birth, the respondent is presumed to be an alien. We previously determined that the respondent had failed to provide the Immigration Judge with evidence to support his citizenship claim and had not sustained his burden of going forward with evidence establishing the claim of United States citizenship. See Matter of Velasco, 16 I&N Dec. 281 (BIA 1977). Additionally, subsequent to the filing of the respondent's motion, the Supreme Court issued its decision

in a case upon which the respondent had intended to rely, Miller v. Albright, 523 U.S. 420 (1998). The Supreme Court's decision was not, however, favorable to the respondent, as it held that the different proof requirements for the father, as opposed to the mother, did not represent an unconstitutional denial of equal protection. Thus, the respondent has not demonstrated that our prior decision was in error.

Based on the foregoing, the motion will be denied.

ORDER: The motion is denied.

/s/
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A22 083 216-Huntsville Date: June 02, 1998

In re: TUAN ANH NGUYEN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Nancy A. Falgout, Esquire
P.O. Box 7873
Houston, Texas 77270

ORDER:

PER CURIAM. We agree with the Immigration Judge that the conviction records submitted in this case establish by clear, unequivocal, and convincing evidence, that you are deportable as charged. See Woodby v. INS, 385 U.S. 276 (1966). No arguments presented during the hearing or on appeal would cause us to disturb this finding.

We note your claim that you are entitled to derivative United States citizenship. We observe that, at your deportation hearing you admitted that you are a native of Vietnam (Tr. at 9). Having admitted your foreign birth, you are presumed to be an alien. However, you failed to provide the Immigration Judge with evidence to support your

citizenship claim. You have not sustained your burden of going forward with evidence establishing your claim of United States citizenship. See Matter of Velasco, 16, I&N Dec. 281 (BIA 1977).

You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offense are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); Matter of Soriano, Interim Decision 3289 (A.G., Feb. 21, 1997).

Additionally, your aggravated felony conviction, for which you were sentenced to a term of imprisonment of 5 years or more, prohibits you from applying for or being granted asylum under section 208(d) of the Act, 8 U.S.C. § 1158(d), and also renders you ineligible for withholding of deportation pursuant to section 243(h)(2)(B) of the Act, 8 U.S.C. § 1253 (h)(2)(B). Matter of Q-T-M-T-, Interim Decision 3300 (BIA 1996).

You also argue that your deportation hearing was unfair because you were not represented by counsel at your hearing. However, the record shows that the Immigration Judge advised you of your right to be represented and granted you a continuance to obtain representation but you failed to do so. Additionally, you have not demonstrated how you were prejudiced by the Immigration Judge's actions. The Immigration Judge properly proceeded with the hearing. See section 292 of the Act, 8 U.S.C. § 1362; 8

C.F.R § 3.16(a); see generally Matter of Madrigal, Interim Decision 3274 (BIA 1996).

Accordingly, your appeal is dismissed.

/s/

FOR THE BOARD

APPENDIX D

U.S. Department Of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of: **Case No.: 22 083 216**

Tuan Anh Nguyen **Docket:Huntsville,TX**

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is deportable on the charge(s) in the Order to Show Cause.

Respondent has made no application for relief from deportation.

It is HEREBY ORDERED that the respondent be deported from the United States to Vietnam on the charge(s) contained in the Order to Show Cause.

It is FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, respondent shall be deported to _____.

If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional

circumstances beyond your control (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances), you will not be eligible for the following forms relief for a period of five years after the date you were required to appear for deportation:

(1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;
(2) Suspension of deportation or voluntary departure as provided for in section 244(e) of the Immigration and Nationality Act: and
(3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

/s/
Immigration Judge

Date: 30 Jan. 97

Due: 3 March 97
Respondent reserves appeal.
(originally handwritten).